DOCKET NO.: DBD-CV-16-6018935-S	)	SUPERIOR COURT
MIDLAND FUNDING, LLC	))	JUDICIAL DISTRICT OF DANBURY
v.	)	AT DANBURY
WILLIAM BASKAY, JR.	)	JANUARY 31, 2017

MEMORANDUM OF DECISION
RE: MOTION FOR SUMMARY JUDGMENT (No. 119.00)

FACTS

The plaintiff, Midland Funding, LLC, commenced this action against the defendant, William Baskay, Jr., claiming compensatory damages and other relief for breach of a credit agreement. The plaintiff alleges the following facts in count one of its complaint. On or before November 30, 2010, the defendant became indebted to Chase Bank USA, N.A. (Chase) through his use of a certain credit account. The plaintiff purchased the credit account on May 14, 2012, for "valuable consideration," and is now the "bona fide owner of the debt." Despite demand upon the defendant, a balance of $8,404.60 remains unpaid and the defendant failed, and continues to fail, to make payments on the account.

In count two, the plaintiff further alleges the following facts. The defendant is liable to it for account stated. Chase "mailed, delivered, sent or otherwise transmitted periodic account statements to the defendant setting forth all of the charges and credits applicable to the account, as well as the balance due." Furthermore, the defendant "received and held these statements for an unreasonable time with no known protest or known notice of defects to Chase . . . as to the charges and amounts due." Moreover, "the final statement transmitted by Chase . . . to the defendant, indicating a balance due and owing, was accepted and held by the defendant for an unreasonable length of time without protest or notice of defect." Thus, the defendant is liable to it in the amount of $8,404.60, minus any credits, for breach of his revolving consumer credit account.

The defendant filed a third amended answer and special defenses (#117) in which he denies that he owes the plaintiff any amounts on the account and leaves the plaintiff to its proof of the remaining allegations of its complaint. In his first special defense to both counts, the defendant alleges that the plaintiff's claims

1/31/17
CM via mail:
- Law offices H.L. Schiff PC
- Hry + Moskow LLC

119.25
2-7-17

are barred by the six-year statute of limitations under General Statutes § 52-576 (a).[1] The defendant also alleges in his second special defense to both counts that the plaintiff is not a proper party to this action and, therefore, its complaint "fails to state a cause of action upon which relief may be granted."

The plaintiff served the defendant with discovery requests in March, 2016, including requests for admissions in accordance with Practice Book § 13-22 et seq. The defendant admitted all but three of the plaintiff's fourteen requests to affirm or deny material facts relating to the plaintiff's causes of action.

On July 22, 2016, the plaintiff moved for summary judgment as to liability and damages on both causes of action, and attached a memorandum of law in support of its motion. The plaintiff argues that this is a simple action to collect a balance due on an ordinary consumer credit account. The undisputed facts of the case indicate that there are no genuine issues of material fact as to ownership of the debt and, therefore, no issues as to the plaintiff's standing to bring these causes of action against the defendant. Moreover, there are no genuine issues of material fact as to the amount of the debt and the defendant's liability for the debt.

In support of its motion, the plaintiff has submitted an affidavit from Kayla Stender, a representative of Midland Credit Management, Inc. (MCM), attesting to the amount of the debt and the plaintiff's ownership of the credit account. Attached to Stender's affidavit are copies of the following: (1) a final statement from Chase to the defendant, dated December 13, 2010; (2) a bill of sale between Chase and Hilco Receivables, LLC (Hilco), transferring ownership of the defendant's account to Hilco; (3) an affidavit of sale of account by original creditor attesting to the accuracy of the sale and assignment of the credit account, including transfer of electronically stored business records between Chase and Hilco; (4) a bill of sale from Equable Ascent Financial, LLC (Equable) (formerly known as Hilco) to the plaintiff, dated May 14, 2012, transferring ownership of the account to the plaintiff; and (5) an affidavit of sale of accounts by debt seller referencing the sale of Equable to the plaintiff. The plaintiff also submits a copy of the defendant's responses to the plaintiff's requests for admissions, a copy of the defendant's responses to the plaintiff's interrogatories and requests for production, and copies of monthly account statements from May, 2009, through December,

---

[1]General Statutes § 52-576 provides: "(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section. (b) Any person legally incapable of bringing any such action at the accruing of the right of action may sue at any time within three years after becoming legally capable of bringing the action."

2010.

On September 28, 2016, the defendant filed an opposition to the plaintiff's motion and argued that Stender's affidavit of debt fails to satisfy the three criteria set forth in Practice Book § 17-46. Specifically, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The defendant argues that Stender does not state that she has access to the plaintiff's records, only records belonging to MCM, the plaintiff's servicer of accounts, and that Stender identifies herself as a legal specialist, but fails to specify the exact nature of her business relationship with the plaintiff. The defendant also argues that the plaintiff has failed to attach certified copies of documents and other records referred to in the affidavit, pursuant to Practice Book § 17-46.[2] In his own affidavit filed in opposition to the motion, the defendant states that he "has not been provided with verified copies of all the instruments purporting to document the assignment of the instruments at issue to the plaintiff or with documentation allegedly appointing [MCM] as the plaintiff's alleged servicer." The defendant also states that he has "never heard of Kayla Stender, who alleges to have access to pertinent records of the plaintiff's servicer." Therefore, the defendant argues, the information contained in the plaintiff's affidavit fails the admissibility requirements for business records, and cannot be relied on by the court in its consideration of the plaintiff's motion. Thereafter, the plaintiff filed a reply memorandum of law on October 19, 2016, asserting that the defendant has failed to offer a valid reason for why the plaintiff's affidavit is defective and should not be considered by the court.

The court heard oral argument on the motion on October 24, 2016. Although not addressed in his written objection to the motion, the defendant asserted at oral argument that the plaintiff failed to commence this action within six years after the defendant defaulted on the credit account, and the plaintiff's claims are therefore barred by the six-year statute of limitations applicable to written contracts. The defendant argued that the six-year statute of limitations bars recovery because the last charge on the card was in August, 2009, and the present action commenced in December, 2015. The plaintiff argued that because the defendant made

---

[2] Practice Book § 17-46 provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto."

a payment on June 25, 2010, the statute of limitations has not run. In response, the defendant argued that because the June 25, 2010 payment was returned, it does not revive the action.

The defendant contends that the causes of action asserted against him in the plaintiff's complaint accrued earlier than December 15, 2009. The evidence before the court indicates that the plaintiff commenced this action by service on the defendant on December 29, 2015, and that the defendant last used the account for a purchase in the ordinary course in August, 2009; thereafter, he made several payments on the account in 2009 and 2010. In 2010, the defendant made payments on February 3, February 25, and March 25, all of which Chase credited to the balance due. The defendant also made four payments of $136 in 2010 on January 25, April 25, May 25, and June 25, which were credited to the account and then immediately returned to the defendant.[3]

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Rodriguez* v. *Testa,* 296 Conn. 1, 6-7, 993 A.2d 955 (2010). "Summary judgment is appropriate where no genuine issue of material fact exists, and the defendant is entitled to judgment as a matter of law, with respect to any one element that the plaintiff is required to prove in order to prevail at trial." *Tyler* v. *Tyler*, 151 Conn. App. 98, 105, 93 A.3d 1179 (2014). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319-20, 77 A.3d 726 (2013). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . Once the moving party has met

[3]At no time during oral argument on the motion, or in his written objection to the motion, did the defendant challenge the accuracy of the monthly statements submitted by the plaintiff in support of its motion. In fact, in his responses to the plaintiff's requests for admissions, the defendant states under oath that he "has no basis to dispute that the monthly statements [attached as (Exhibit 1) to the requests for admissions] are not true and correct."

its burden . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . ." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015). "It is axiomatic that in order to successfully oppose a motion for summary judgment by raising a genuine issue of material fact, the opposing party cannot rely solely on allegations that contradict those offered by the moving party, whether raised at oral argument or in written pleadings; such allegations must be supported by counteraffidavits or other documentary submissions that controvert the evidence offered in support of summary judgment." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 178, 73 A.3d 742 (2013). When a party moves for summary judgment "and there [are] no contradictory affidavits, the court properly decide[s] the motion by looking only to the sufficiency of the [movant's] affidavits and other proof." *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, 231 Conn. 756, 795, 653 A.2d 122 (1995).

In *Midland Funding, LLC* v. *Mitchell-James,* 163 Conn. App. 648, 137 A.3d 1 (2016), the Appellate Court reversed the trial court's granting of summary judgment in favor of the plaintiff, holding that it was error for the trial court to have relied on the information contained in the affidavit because it did not satisfy the business records exception to the hearsay rule. Id., 661-62. In *Mitchell-James,* the plaintiff moved for summary judgment on a credit account similar to the one at issue in the present case, claiming damages for breach of contract and account stated. Id., 650. The plaintiff filed an affidavit from the plaintiff's servicer of accounts, similar to Stender's, including attached exhibits that purported to verify assignment of the credit account from the original servicer and the amount of the debt. Id. On appeal, the court agreed with the defendant's claim that the affidavit was inadmissible under the business records exception to the hearsay rule for computer generated records because the affiant failed to establish the reliability of the servicer's computer system and the affiant did not set forth her acquaintance with the methods by which the servicer's records were made. Id., 656-58, 661. "Heeding our Supreme Court's caveat that [c]omputers may . . . make errors that arise out of defects in the software, the input procedures, the data base, and the processing program . . . we conclude that it was incumbent on the plaintiff to produce an affidavit from a person who is familiar with computerized records not only as a user but also as someone with some working acquaintance

with the methods by which such records are made . . . to establish the reliability of the plaintiff's computer system." (Citations omitted; internal quotation marks omitted.) Id., 660-61.

The court has carefully reviewed the plaintiff's affidavit of debt furnished to the court in support of the present motion. Stender states in her affidavit that she has access to and has "reviewed the electronic records pertaining to the account maintained by MCM" and that she is "authorized to make this affidavit on the plaintiff's behalf." She states that "[t]he electronic records reviewed consist of data acquired from the seller when the plaintiff purchased the account, together with records generated by MCM in connection with servicing the account since the date the account was purchased by the plaintiff." In addition, she asserts that she "reviewed the documents that are attached to this affidavit" and that she is "familiar with and trained on the manner and method by which MCM creates and maintains its business records pertaining to this account." She continues: "The records are kept in the ordinary course of business. It was in the regular course of business for a person with knowledge of the act or event recorded to make the record or data compilation, or for a person with knowledge to transmit information thereof to be included in such record. In the regular course of business, the record or compilation is made at or near the time of the act or event."

The court is satisfied that the information contained in Stender's affidavit and other records referenced in the affidavit are authentic and reliable, and would be admissible at trial through the hearsay exception for business records. The court also agrees with the plaintiff that it has satisfied its burden of proof through these documents that there are no material issues of fact as to (1) the plaintiff's ownership of the debt; (2) the amount of the debt claimed to be due; and (3) the defendant's liability for the debt.

The court also finds that there is no genuine issue of material fact as to the date when the plaintiff's causes of action accrued against the defendant, and whether the plaintiff commenced this action in a timely fashion. The undisputed evidence before the court indicates that the defendant charged purchases to the account in the ordinary course of the credit agreement in June, July, and August, 2009. He continued to make payments on the account until June, 2010. By doing so, he acknowledged the debt to Chase as late as 2010 and extended commencement of the six-year limitations period from that date.

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Pelletier* v. *Galske,* 105 Conn. App. 77, 81, 936 A.2d 689 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1100 (2008).

"[E]ach use of a credit card constitutes a representation by the cardholder of his or her intention to pay for the charges to the account." *American Express Bank, FSB* v. *Bennett,* Superior Court, judicial district of Middlesex, Docket No. CV-14-6012244-S (September 11, 2015, *Aurigemma, J.*) (61 Conn. L. Rptr. 15, 17).

"[I]t is clear that in applying the statute of limitations to an account, every new item of credit or part payment is an acknowledgment of the account and is equivalent to a new promise to pay the balance due thereon." (Internal quotation marks omitted.) *Oaks Condominium Assn.* v. *Lemay,* Superior Court, judicial district of New Britain, Docket No. CV-95-0466793-S (August 7, 1997, *Holzberg, J.*) (20 Conn. L. Rptr. 359, 360), citing *Weadon* v. *First National Bank & Trust Co.,* 129 Conn. 541, 544, 29 A.2d 779 (1943). "When payments are made on [an open] account, the statute [of limitations] runs from the last payment. The statute begins to run after the last transaction." (Internal quotation marks omitted.*)* *Fairfield Plumbing & Heating Supply Corp.* v. *Arch Fracker Plumbing & Heating Contractor, Inc.,* Superior Court, judicial district of Fairfield, Docket No. CV-93-030551-S (June 16, 1993, *Spear, J.*), citing *Weadon* v. *First National Bank & Trust Co.,* supra, 129 Conn. 544.

Furthermore, "[p]artial payment of a debt which is barred by the statute of limitations removes a case from the statute provided that, under the circumstances, it constitutes an acknowledgment of the indebtedness sued upon as a then existing debt. . . . The Statute of Limitations creates a defense to an action. It does not erase the debt. Hence, the defense can be lost by an unequivocal acknowledgment of the debt, such as a new promise, an unqualified recognition of the debt, or a payment on account." (Citations omitted; internal quotation marks omitted.) *Zapolsky* v. *Sacks,* 191 Conn. 194, 198, 464 A.2d 30 (1983).

Our Appellate Court has held that "[a] general acknowledgment of an indebtedness may be sufficient to remove the bar of the statute. The governing principle is this: The determination of whether a sufficient acknowledgment has been made depends upon proof that the defendant has by an express or implied recognition of the debt voluntarily renounced the protection of the statute. . . . But an implication of a promise to pay cannot arise if it appears that although the debt was directly acknowledged, this acknowledgment was accompanied by expressions which showed that the defendant did not intend to pay it, and did not intend to deprive himself of the right to rely on the Statute of Limitations." (Internal quotation marks omitted.) *Zatakia* v. *Ecoair Corp.,* 128 Conn. App. 362, 369-70, 18 A.3d 604, cert. denied, 301 Conn. 936, 23 A.3d 729 (2011); see also *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.,* 76 Conn. App. 599,

612, 821 A.2d 774, cert. denied, 264 Conn. 919, 828 A.2d 617 (2003) (letter to credit card company indicating that any excess payment to second account would apply to first account constitutes acknowledgment of entire debt and statute of limitations was tolled).

In the present case, the defendant provided the plaintiff with no accompanying instructions limiting how the payment was to be applied and did not reserve his right to rely on the statute of limitations. The fact that Chase returned four of the defendant's payments in 2010 does not change the legal force and effect of those payments; when determining whether the statute of limitations applies, it is the debtor's intention that controls, not the actions of the creditor. The defendant's last payment on June 25, 2010 validated the plaintiff's debt as of that date and tolled commencement of the start date for purposes of the applicable statute of limitations. The plaintiff's commencement of this action in December, 2015 was, therefore, timely.

CONCLUSION

For the reasons set forth above, the plaintiff's motion for summary judgment is granted. Judgment enters in favor of the plaintiff and against the defendant on both counts of the plaintiff's complaint in the amount of $8,404.60.

By the Court,

Anthony D. Truglia, Jr., J.